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Supreme Court of the United States

OCTOBER TERM, 1945

No. 514

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant, by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN and EDWARD G. LINDBERG,

Petitioners,

—against—

TOWN OF ORANGETOWN and MAX FRIEDMAN,

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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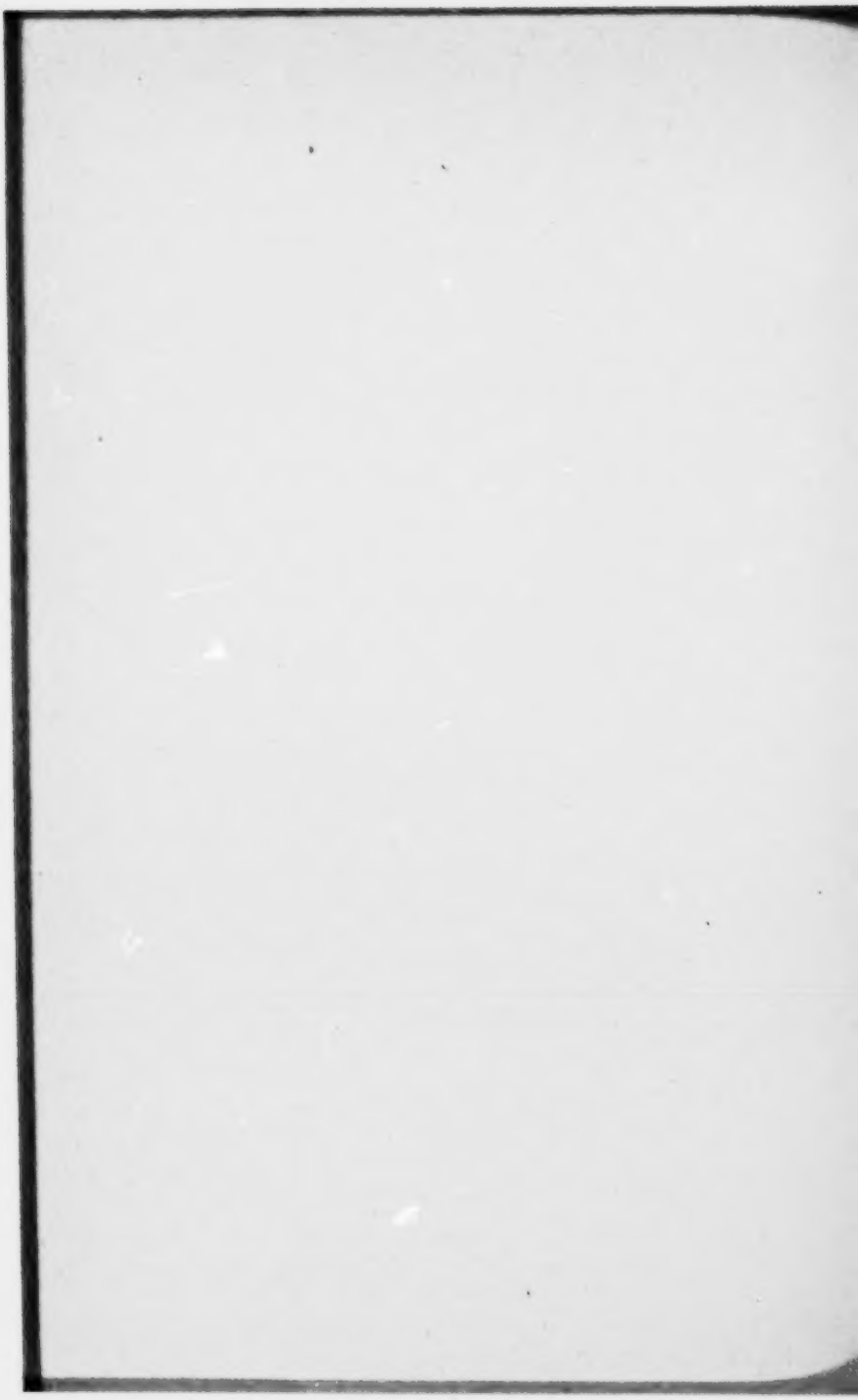

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I. War measures, such as the New York War Emergency Act, when properly construed do not grant immunity for reckless conduct carried on in wanton disregard of the rights and safety of others. Although there was proof from which the jury could have found that Friedman so had acted, the Trial Court's charge erroneously required the jury to find for defendants merely because Friedman was responding to an air-raid signal. The construction thus placed upon the statute creates doubt as to its constitutionality 9

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Supreme Court of the United States

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No. .....

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant, by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN and EDWARD G. LINDBURG,

Petitioners,

—against—

TOWN OF ORANGETOWN and MAX FRIEDMAN,

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Second Circuit:

The petition of your petitioners respectfully shows to this Honorable Court:

Summary Statement of Matter Involved

Petitioners, hereinafter sometimes referred to as plaintiffs, seek to review under Judicial Code, Sec. 240, 28 U. S. C. Sec. 347, a decree of the Circuit Court of Appeals, Second Circuit, dated July 16, 1945, affirming

by a divided court, Clark, C.J., dissenting, a final judgment of the District Court of the United States for the Southern District of New York, entered in favor of defendants upon a verdict following a trial before Moscowitz, J., and a jury (146-150).*

The action is in negligence for the death of Charles Lee Smith, intestate of the plaintiff Josh David Smith, and for injuries to the other plaintiffs. Judisdiction is based upon diversity of citizenship.

On November 22, 1943, at about 9:30 P. M., defendant Friedman crashed with his automobile into the rear of a battalion of soldiers from nearby Camp Shanks, who were on a night-practice march (362, 382-384), killing Smith and severely injuring the others.** The accident occurred in Rockland County, New York, on State Road 9-W, between the Villages of Piermont and Sparkill (655, 656).

Friedman was a member of the Orangetown Police Department (160) and was driving from Nyack to Police Headquarters at Sparkill, in response to an air-raid practice black-out signal (472-474, 524).

The complaint asserts that Friedman operated his car carelessly, negligently and recklessly and that there was no contributory negligence on the part of the deceased or of the injured men (15, 18, 28, 31). These

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*(All references, unless otherwise qualified, are to the folios of the record.)

**(The testimony in respect of the injuries suffered by plaintiffs is omitted from the record and these papers will not discuss the injuries or the treatment given to the men since those facts are not relevant to the questions presented.)

allegations are denied by each defendant, and each answer affirmatively pleads contributory negligence (63, 78, 99).

Each answer also affirmatively pleads immunity from liability under New York State War Emergency Act, Laws, New York, 1942, Ch. 445, amended Ch. 544, Sec. 40, which provides that no person who is "in good faith carrying out, complying with, or attempting to comply with any law or duly promulgated rule, regulation, or order * * * relating to civilian protection, shall be liable for any injury or death to persons or damage to property as a result of such activity". The answers allege that Friedman, in good faith, was carrying out a duly promulgated order relating to civilian protection (80-82, 99-103). The principal question sought to be reviewed is the soundness of the construction placed upon that statute by the Courts below.

The case was tried before Judge Moscowitz and a jury, whose verdict for defendants was rendered following a charge which petitioners claim erroneously required such verdict. Appeal was taken to the Circuit Court of Appeals for the Second Circuit which, Clark, C.J. dissenting with an opinion, affirmed the judgment of the District Court. Augustus N. Hand, C.J., wrote the prevailing opinion. An opinion was written by Judge Moscowitz, reported at 57 Fed. Supp. 52. The opinions of the Circuit Court of Appeals are not reported excepting on the front page of the New York Law Journal of September 14, 1945.

Questions Presented and Reasons Relied on for Allowance of the Writ

I

War measures, such as the New York War Emergency Act, for the protection of civilians, should not be construed as here was done so as to extend their immunity for acts done in carrying out war orders to reckless conduct carried on in wanton disregard of the safety of others. To so construe such statutes creates grave doubts as to their constitutionality.

The question is a novel one of general importance and of public concern which presents a question of Federal law not settled by this Court.

II

The charge of the Trial Court was erroneous in the following respects:

1. The issue of contributory negligence;
2. The effect of New York General Municipal Law, Section 50c;
3. The burden of proof upon the issue of good faith;
4. The undue emphasis upon the fact that Friedman was responding to an air-raid black-out signal.

III

The Trial Court improperly interfered with plaintiffs' counsel's presentation of the case.

IV

Defendants' counsel, on summation, appealed to the jury's prejudices.

V

Under New York State Constitution, the War Emergency Act is not a defense to the action for the death of Smith.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court to review the said decree of the Circuit Court of Appeals for the Second Circuit, affirming said judgment of the District Court of the Southern District of New York, and that your petitioners have such other and further relief as may seem meet and just, and your petitioners will ever pray.

JOSH DAVID SMITH, as administrator of the goods, chattels and credits of CHARLES LEE SMITH, deceased; OLIN LEROY POWELL, an infant, by Robert H. Shaw, his guardian ad litem; FRANK T. VADALA, an infant, by Robert H. Shaw, his guardian ad litem; EDWARD WALTERS, an infant by Robert H. Shaw, his guardian ad litem; WALLACE K. NUNN; EDWARD G. LINDBERG.

By: LEONARD ACKER.